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## Articles

# WHAT DOES THE SECOND AMENDMENT RESTRICT? A COLLECTIVE RIGHTS ANALYSIS

*Carl T. Bogus\**

### I. INTRODUCTION

According to the collective rights model, the Second Amendment only grants people the right to keep and bear arms within the militia. Moreover, the Amendment does not apply to private militias but only to the militia organized by Congress—that is, to the National Guard. This seems to give the Amendment very little bite. We are accustomed to thinking of the Bill of Rights as granting individuals broad, meaningful rights against governmental interference. The entire notion of a right is something one is entitled to even though the majority, through its elected representatives, decides otherwise. Thus, we have the right to speak and worship as we desire even if the government decides such speech or religious worship is harmful to the community; we have the right to a jury trial in certain circumstances even if the government decides that there are better ways to discover the truth. What kind of right is it, then, that gives individuals the right to keep and bear arms only within an entity organized and controlled by the government itself? After all, the government decides who is in the National Guard, and no one questions the National Guard's ability to regulate—fully and absolutely—the possession and use of weapons by its members in

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\* Professor of Law, Roger Williams University. The author wishes to thank Michael C. Dorf, Saul Cornell, and participants in the Symposium on Guns, Crime and Punishment in America at the University of Arizona College of Law, where an earlier version of this paper was presented, for their helpful comments. Copyright 2002 by Carl T. Bogus. All rights reserved.

their military capacities. Does the collective rights model therefore render the Second Amendment meaningless?

This question has enormous significance in the debate between those who believe the Second Amendment grants a collective right and those who believe it grants individuals a right to keep and bear weapons for their own purposes, outside and irrespective of militia membership.<sup>1</sup> Advocates of the individual rights model can justifiably argue that an interpretation of the Amendment that renders it meaningless should be disfavored.<sup>2</sup> Admittedly, it is theoretically possible that the Second Amendment had meaning in 1791 but that over the past two hundred and ten years it has become an anachronism. It is also possible, as some have argued, that the right is presently dormant but may reawaken in the future.<sup>3</sup> Nevertheless, it is an accepted canon of constitutional construction that when two possible interpretations of a provision are available, we should generally avoid the one that renders the provision meaningless or purposeless.<sup>4</sup> Therefore, the collective rights model is weakened if it drains the Second Amendment of any kind of practical utility or meaning. This criticism cuts with greatest force if the collective rights model renders the provision meaningless in 1791, of course. Still, the criticism retains at least some rhetorical power if the model renders the provision meaningless today, even if it has been primarily the passage of time that has drained the amendment of practical significance.

I do not believe that this is the case however. Although the Second Amendment grants only a collective right, it had genuine meaning with potential real-world consequences in 1791, and it still does today. However, I submit that the proper reading of the Amendment is not the one it is generally given. In this paper I shall explore the question of what vitality the collective rights interpretation of the Second Amendment has today—specifically, what restrictions the Amendment places on government activity at the beginning of the twenty-first century.

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1. See Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 Chi. Kent L. Rev. 3 (2000).

2. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect”).

3. See e.g., H. Richard Uviller and William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 Chi. Kent L. Rev. 403 (2000).

4. See, e.g., *Massachusetts Assn. of Health Main. Orgs. v. Ruthardt*, 194 F.3d 176, 181 (1st Cir. 1999) (“[a]ll words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.”) (citation omitted).

## II. THE COLLECTIVE RIGHTS MODEL

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>5</sup> All serious readers of the Second Amendment recognize that the Second Amendment is tied to the militia. Individual rights advocates downplay that connection, often by use of two techniques. First, some suggest the prefatory phrase merely explains why the right is granted but does not define it—that is, that the Amendment is to be given exactly the same meaning as if the first thirteen words did not exist. Second, some individual rights advocates argue the Founders believed in a universal militia that in eighteenth century America included all adult, white males, and in contemporary America would include all adults. Both of these arguments drive to the same conclusion: every adult American has a right to keep and bear arms, regardless of whether one actually serves in the militia.

Several problems arise in these arguments however. First and foremost, the Founders as a whole did not believe in a universal militia. Notwithstanding popular myth and Fourth of July rhetoric, the militia was a flop in the war against the British. General Nathaniel Greene explained why:

People coming from home with all the tender feelings of domestic life are not sufficiently fortified with natural courage to stand the shocking scenes of war. To march over dead men, to hear without concern the groans of the wounded, I say few men can stand such scenes unless steeled by habit and fortified by military pride.<sup>6</sup>

So often did the militia turn and run in the face of the enemy that it became Continental Army doctrine to position militia forces in front of and between Continental Army regulars, who were given strict orders to shoot the first militiamen to bolt.

After the Revolutionary War the Founders were divided on how the militia should be organized. While some continued to favor a universal militia, others—including Alexander Hamilton, for example—had become convinced that only a select, highly trained militia would be useful. At the Constitutional Convention in Philadelphia, the Founders decided the Constitution

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5. U.S. Const., Amend. II.

6. See John K. Mahon, *History of the Militia and the National Guard* 43 (MacMillan, 1983).

should not permanently decide how the militia should be organized; rather, this was to be a policy question left up to Congress. Hence, Congress was given the authority to organize the militia as it saw fit, with the ability to change the composition of the militia as the passage of time and circumstances may demand.<sup>7</sup>

Individual rights advocates face another problem when they attempt to read the Amendment in a way that essentially ignores the prefatory phrase. This too violates the canon of constitutional construction that provisions should be read in a way that gives every phrase and every word operative meaning. We are to presume that the drafters inserted each and every word deliberately, intending that nothing be superfluous or without purpose.<sup>8</sup> This canon presents considerable difficulty for an interpretation treating the first thirteen words of the Amendment as a mere annotation explaining why the Founders decided to write the next fourteen words.

The argument that the word *militia* in the Second Amendment should be read to mean a universal militia consisting of all adult citizens has even greater—indeed, fatal—problems. Another fundamental canon of construction provides that the Constitution is to be read as a whole.<sup>9</sup> Amendments are not to be treated as isolated provisions but as integral parts of the entire document.<sup>10</sup> Moreover, when a word is repeated it is presumed to have the same meaning in each place; thus, when in one instance a word may be susceptible to different meanings, but in another has a definite meaning, we should presume the word was used in the same sense in both places.<sup>11</sup> When we combine this canon with the facts that (1) Madison was the principal drafter of both provisions and clearly knew how militia was defined in the main body of the Constitution, (2) the Founders expressly stated that they had decided not to resolve the universal

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7. The belief in a universal militia did not last long however. Indeed, the belief in the militia as an effective military force—whether universal or select—also did not last long. In his first presidential address, Jefferson said that “a well-disciplined militia [is] our best reliance in peace, and for the first moments of war, till regulars relieve them.” But the state militias were so ridiculous at annual musters—often drunk and disorderly, and abysmal shots—that states made it unlawful to mock them during musters. By his second term Jefferson had given up, declaring that the nation “would have to settle for a standing army.”

8. See, e.g., *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995); *Succession of Lauga*, 624 So. 2d 1156 (La. 1993), reh’g denied (Nov. 4, 1993); *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515 (Mo. Banc 1991).

9. E.g., *Shamburger v. Duncan*, 253 S.W.2d 388, 391 (Ky. 1952).

10. E.g., *Kirkpatrick v. King*, 91 N.E.2d 785, 788 (Ind. 1950).

11. E.g., *House v. Cullman County*, 593 So.2d 69, 72 (Ala. 1992).

militia versus select militia debate but to entrust this as a policy question for Congress, and (3) Madison stated that nothing in the Bill of Rights was in any fashion designed to alter the main body of the Constitution, the argument that *militia* means all adult citizens cannot reasonably be maintained.

This brings me back to the collective rights model. Why provide, on the one hand, that Congress can organize the militia as it sees fit—deciding who serves in the militia, and regulating possession and use of weapons in militia service—and on the other hand state that the people have a right to keep and bear arms within the militia? A little background is necessary to answer that question.

As I have explained in detail elsewhere,<sup>12</sup> and will only briefly state here, I believe Madison wrote the Second Amendment to assure the South that Congress—which had just been given the lion's share of authority over the state militia in the recently-ratified Constitution—would not use that power to undermine the slave system. In part, this was an amendment to the slave compromise in the Constitution. At the Constitutional Convention in Philadelphia, southern delegates made it clear the subject of slavery was not negotiable: either the North<sup>13</sup> would agree not to attempt to abolish slavery or the southern states would walk away from Philadelphia and a Union with the North. The result was an obscurely stated constitutional compromise. While scrupulously avoiding the words "slave" and "slavery," the Constitution prohibited Congress from abolishing the African slave trade until 1808 or imposing an import tax of more than ten dollars per slave. It also required that runaway slaves escaping across state lines (and into free territory) be returned to their owners. And it provided for counting slaves as three-fifths of free persons for the purposes of apportioning congressional representation and direct taxation.

The southern delegates told their constituents that, most importantly of all, the Constitution did not grant Congress any authority to abolish slavery, and that the northern delegates conceded this was the case. But not everyone was satisfied. During the ratification debates, southern anti-Federalists argued that by

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12. Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. Davis L. Rev. 309 (1998).

13. New York, New Jersey, Delaware, and the New England states were then referred to as the Eastern states. To avoid confusion, I refer to them as the North or the northern states.

giving Congress the power to organize and arm the militia<sup>14</sup> and to call them into federal service,<sup>15</sup> the Constitution gave Congress the means to undermine the slave system indirectly. Congress might either disarm the militia or physically remove them from a state, thus leaving the white population vulnerable to slave revolt. It was a frightening prospect.

I believe that when Virginia sent Madison to the first Congress, Madison sought to correct part of this problem by writing the Second Amendment. Madison's objective was to strengthen the slave compromise by adding another provision to the militia clauses of the Constitution. Madison wanted to make it clear that although Congress had the authority to arm the militia, it could not disarm the militia, at least not entirely. Put somewhat more succinctly, the states were to have a right to armed militias. This makes sense once one understands that the principal, and from Madison and the South's point of view, critical function of the militia was slave control. That had been true before and during the Revolution, and it remained true afterwards. In 1734, for example, South Carolina officially declared that slave patrols took precedence over other militia functions.<sup>16</sup> In 1756, Charles Pinckney, chief justice of the Supreme Court of South Carolina, reported that the colony's militia was unreliable for any function other than slave control.<sup>17</sup> During the Revolutionary War, the South often refused to commit her militia to the war against the British, fearing the absence of the militia left it exposed to slave revolt.<sup>18</sup>

If the states were to have the means to provide for their own security, they needed an armed militia. This did not mean the states had a right to a fully armed populace; indeed, the idea of everyone having arms was anathema at the time. Nor did it mean the states rather than the federal government were to have

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14. The Constitution gives Congress the power:

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

U.S. Const., Art. I, § 8, cl. 16.

15. The Constitution gives Congress the power:

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions.

U.S. Const., Art. I, § 8, cl. 15.

16. See Michael A. Bellesiles, *Arming America* 151 (Alfred A. Knopf, 2000).

17. Id. See also M.E. Bradford, *Founding Fathers* 194 (U. Press of Kansas, 2d ed. 1994) (noting that Pinckney was chief justice of South Carolina).

18. See Michael A. Bellesiles, *The Origins of Gun Culture in the United States 1760-1865* at 83 J. Am. Hist. 425, 429 (1996).

the right to regulate arms within the militia. Congress continued to have the authority to discipline, that is, regulate, the militia, with the new qualification that it could not wholly deprive a state of an armed militia and thus the means of providing for its own security.

One might ask why—if the Second Amendment essentially means that the states have a right to an armed militia—the Amendment does not say that directly rather than referring to a “right of the *people* to keep and bear Arms.” The answer has to do with how the militias were armed in colonial America. Today, of course, weapons in the hands of the National Guard are furnished by the government; but that was not the case in colonial America. Guns were extremely expensive, and the colonies could not afford them in great numbers. The attempted solution was to require militia members to furnish their own arms or to require others to do so on their behalf. For example, when Connecticut enacted its first militia act in 1637, it made the towns responsible for supplying firearms and munitions to militia members.<sup>19</sup> But the firearms were too expensive and the towns largely ignored the law, preferring the occasional small fines that the Connecticut General Court imposed for non-compliance.<sup>20</sup> When Congress enacted the first militia act in 1792 it required militia members to arm themselves.<sup>21</sup>

State laws also made it clear that all firearms were essentially governmental property whether purchased privately or supplied by a public body. The government could regulate whether guns were to be kept at home or in an armory, whether they could—or must—be carried when on public business, and under what circumstances they could be used. State legislatures enacted statutes giving government officials the right to expropriate and redistribute all firearms and ammunition, including arms individuals had purchased themselves, as necessary to deal with crises.<sup>22</sup> As Michael A. Bellesiles writes: “[T]he government reserved to itself the right to impress arms on any occasion, either as a defensive measure against possible insurrection or for use by the state. No gun ever belonged unqualifiedly to an individual.”<sup>23</sup> Therefore, though today a *right* of the people to keep and bear arms within a government regulated militia seems like

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19. See Bellesiles, *Arming America* at 77 (cited in note 16).

20. *Id.*

21. See *Perpich v. Dep't. of Def.*, 496 U.S. 334, 350 (1990).

22. See Bellesiles, *Arming America* at 70-80 (cited in note 16).

23. *Id.* at 79.



an oxymoron, such a right made sense when the militia was armed by weapons in the hands of the people.

I submit, therefore, that even though the Amendment protects a right of the *people*, in contemporary terminology it provides the states with a right to an armed militia. The Amendment is properly seen as qualifying, though not essentially altering, the militia provisions in the Constitution. Congress has the authority to organize the militia but not to organize it out of existence, the right to arm the militia but not the right to disarm it entirely, the right to call the militia into federal service but not to do so in ways that unduly jeopardize a state's security. I say "unduly jeopardize" because national security may both transcend and subsume state security. Calling forth the militias to repel an invasion on, say, the southern border might be justified even though it left the New England states defenseless against local insurrection, because the invasion would ultimately threaten the security of the all the states.

Needless to say, this is not how the Second Amendment is generally analyzed. Over the last half of the twentieth century, at least, we have become accustomed to thinking about whether the Amendment prohibits gun control legislation affecting the general population. But, I submit, a correct interpretation of the Amendment focuses instead on the militia. The correct question is whether the Second Amendment restricts federal control of the militia, and if so, how. Such restrictions may be modest but nonetheless significant. This is not a new view. One history of the National Guard, for example, states simply that the Second Amendment "was intended to prevent the federal government from disarming the militia."<sup>24</sup> But it is becoming something of a forgotten view.

### III. FOUR CASE HISTORIES

What then are some of the circumstances that would raise genuine Second Amendment issues? This section presents four historical episodes for consideration, which I offer as real world examples of the kind of federal action to which the Second Amendment is germane. In the following section (section IV), I will offer some observations about whether, when faced with

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24. U.S. Advisory Comm'n on Intergovernmental Relations, Pub. No. A-124, *The National Guard: Defending the Nation and the States* 8 (1993) (footnote omitted) ("*Defending the Nation*").

cases arising out of these incidents, the courts should have found that the federal action did violate the Second Amendment.

A. PROHIBITING MILITIA IN THE FORMER CONFEDERATE STATES (1867)

After the Civil War, former Confederate Army regiments in the southern states began to reconstitute themselves as state militia units. They often wore Confederate Army uniforms, carried the Confederate battle flag, and intimidated emancipated slaves. This alarmed Republicans in Congress, and on February 26, 1867, Senator Henry Wilson of Massachusetts introduced an amendment to the army appropriations bill then pending in Congress. Wilson's amendment read in its entirety:

*And be it further enacted, That all militia forces now organized or in service in either of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Louisiana, Mississippi and Texas, further organization, arming, or calling into service of the said militia forces, or any part of thereof, is hereby prohibited under any circumstances whatever until the same shall be authorized by Congress.*<sup>25</sup>

A debate ensued, focused in part on whether depriving the states of their militias would violate the Second Amendment. Senator Virginia Senator Waitman T. Willey of West Virginia said:

It seems to me that this is a very sweeping provision, and which can only be justified I imagine by some very pressing public urgency or necessity, to deprive these States of the use of their militia for the purpose of maintaining their police regulations in many places. The disability, as I understand the amendment, is total; the whole of the militia organizations of these States is to be entirely destroyed; the militia of the States are not to bear arms in any event or under any condition. It strikes me that it is assuming to Congress a very extraordinary power, one which none but the most extreme necessity would justify. It may be well imagined that there may be instances when it would be necessary, for the best of purposes, to keep the peace of the State, to maintain proper police regulations, that the militia should at least carry arms to a limited extent. It strikes me also that there may be some constitutional objection against depriving men of the right to bear

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25. Cong. Globe, 39th Cong., 2nd Sess. 1848 (1867).

arms and the total disarming of men in time of peace.<sup>26</sup>

Senator Wilson defended his proposal by arguing that it would prohibit the formation of militia units but not the enforcement of police regulations by other authorized officials. More important for our purposes, Wilson also argued the ban on militia was to be only temporary. Once "matters are settled," he said, "these States will be at liberty to organize their militia as the other States do."<sup>27</sup> After Senator Thomas A. Hendricks of Indiana (who would later be Vice President under President Grover Cleveland) also contended that the provision violated the Second Amendment, Wilson offered a compromise: He was willing to strike out the word "disarmed."<sup>28</sup> Willey graciously rejected the offer, however. Although he said he found the amendment less offensive with the word deleted, Willey stated he would vote against the measure nonetheless because it still prevented "the arming and employment" of militia forces.

The amendment passed 23 to 11. President Andrew Johnson wanted to veto the measure but could not do so without vetoing the entire army appropriations act and depriving the Army of funds and Union soldiers of their salaries.<sup>29</sup> He therefore signed it under protest, sending Congress a message protesting the portion of the Act that, in his words, "denies to ten States of the Union their constitutional right to protect themselves, in any emergency, by means of their own militia."<sup>30</sup>

## B. FEDERALIZING THE ARKANSAS NATIONAL GUARD (1957)

Two years before the Supreme Court handed down its opinion in *Brown v. Board of Education*, the city of Little Rock, Arkansas had already designed a seven-year school integration

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26. Id. Some may seize upon Willey's phrase "depriving *men* of the right to bear arms" rather than depriving the state of an armed militia as evidence that Willey envisioned the Constitution as protecting an individual right to bear arms rather than the collective right of the states to have armed militias (emphasis added). In my judgment, however, it would be a mistake to attach too much significance to Willey's imprecise use of language. After all, the amendment did not disarm individuals; it prohibited militias forces.

27. Id. at 1849.

28. Id. "Of course," he added, "in time of war people bearing arms in hostility to the Government would not be protected by this provision of the Constitution."

29. See Mahon, *History of the Militia and National Guard* at 108 (cited in note 6); Albert Castel, *The Presidency of Andrew Johnson* 113 (The Regents Press of Kansas, 1979).

30. Message from the President of the United States to House of Representatives Transmitting Notice of Signing the Army Appropriations Bill, 40th Cong., 1st Sess., March 2, 1867.

plan.<sup>31</sup> The plan had been devised under the leadership of the city's mayor, Woodrow Mann, and was approved by the school board. Litigation was filed challenging the plan as proceeding too slowly but the federal court disagreed, approving the school board's plan but retaining jurisdiction to ensure the plan in fact moved with all deliberate speed. The plan was to begin in 1957 with the admission of 25 black students to the city's 2,000-student Central High School.

Everything was expected to proceed smoothly until Marvin Griffin, the governor of Georgia, came to town and gave a fiery speech attacking school integration. Griffin's speech found an enthusiastic response in certain quarters, stimulating Arkansas Governor Orval Faubus to seize on the issue as a means of improving his political fortunes. Faubus, a colorless individual with declining popularity, was in the middle of his second two-year term. He faced a daunting task in trying to win re-election because Arkansas had a strong tradition against governors serving for more than two terms.

Faubus' opening gambit was to call Deputy Attorney General William Rogers to ask what the federal government could do to prevent violence when the integration plan went into effect in September. Rogers told Faubus that local disorders were generally the province of the local police, but he dispatched the head of the Civil Rights Division of the Department of Justice, who happened to be an Arkansas native, to Little Rock to find out what was going on. When this official asked Faubus why he expected violence, Faubus said his intelligence was "too vague and indefinite to be of any use to a law enforcement agency,"<sup>32</sup> and Faubus was otherwise sufficiently strange and elusive to lead federal officials to suspect that Faubus, himself, was going to try to stir up trouble.

In August, a white woman filed a state court action seeking to enjoin the integration plan because, she claimed, it would lead

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31. For the description of the Little Rock episode, I draw heavily on two works: Jack Greenberg, *Crusaders in the Courts* 228-43 (Basic Books, 1994), and William Manchester, *The Glory and the Dream: A Narrative History of America 1932-1972* at 978-90 (Little, Brown & Company, 1973). I also consulted Taylor Branch, *Parting the Waters: America in the King Years 1954-1963* at 222-25 (Simon and Schuster, 1988); Mahon, *History of the Militia and National Guard* at 224-25 (cited in note 6); Geoffrey Perret, *Eisenhower* 550-54 (Random House, 1999); Elmo Richardson, *The Presidency of Dwight D. Eisenhower* 150-55 (U. Press of Kansas, 1991). Where sources have differed, as they have in a number of details, I relied on Jack Greenberg's account generally and John K. Mahon's account of military matters.

32. See Manchester, *The Glory and the Dream* at 800 (cited in note 31).

to violence. Faubus is assumed to have been the moving force behind the lawsuit; he personally testified in the proceeding, stating that revolvers had been found in the possession of both black and white students. The state court granted the injunction. However, at the request of the Little Rock school board the federal district court promptly dissolved that injunction and prohibited the state court from interfering in the desegregation of the schools.

There were, in fact, no genuine omens of violence. Nevertheless, Mayor Mann and the city police force worked out contingency plans to control demonstrations, should that be necessary. They did not expect trouble, however, and were confident the 175-member city police force could handle it should it occur.

On the evening before the school term was to begin, Faubus appeared on Little Rock television to announce that the city was plunging into violence. Local stores were selling out their supply of knives, "Mostly to Negro youths," he said. "[T]he evidence of discord, anger, and resentment has come to me from so many sources as to become a deluge," so he had called out the Arkansas National Guard "to maintain or restore the peace and good order of this community."<sup>33</sup> He had directed the Guard to prevent black students from entering the school because, he said, if they did, "Blood will run in the streets."<sup>34</sup> An hour before Faubus spoke, National Guard troops, bearing M-1 rifles with fixed bayonets, had already surrounded Central High School.

Faubus' claims of impending violence were bunk. The FBI checked one hundred stores and found that knife sales were below normal levels. Mayor Mann said there had been no indication whatsoever of possible violence. And three other Arkansas towns peacefully integrated on that same day.

The school board asked the black students not to attempt to enroll the next morning and returned to federal district court for instructions. The judge ordered the board to proceed with its plan. On September 4, parents of only nine of the 25 black students who were scheduled to be enrolled permitted their children to attempt to go to school. Faubus had finally generated his mob. As they approached the school, the black students were jostled by angry segregationists screaming racial epithets. Nevertheless, accompanied by white and black ministers, the students made their way to the National Guard perimeter, where

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33. *Id.* at 801.

34. Greenberg, *Crusaders in the Courts* at 229 (cited in note 31).

they were confronted by a solid wall of Guardsmen and told, "Governor Faubus has placed this school off limits to Negroes."<sup>35</sup>

The federal district judge made Faubus a defendant in the case and ordered him to appear in court on September 20th to show cause why he should not be enjoined from obstructing the enrollment of black students at the high school. Federal marshals proceeded to the governor's mansion, where they passed easily through a perimeter of National Guardsmen to hand the Governor a subpoena to appear in court.

At this juncture, Faubus sought presidential help. In response to a question at a press conference two months earlier, President Eisenhower had said, "I can't imagine any set of circumstances that would ever induce me to send federal troops . . . into any area to enforce the orders of a federal court, because I believe that [the] common sense of America will never require it."<sup>36</sup> Perhaps this led Faubus to believe the President would commit to not using troops to enforce federal court orders. Faubus flew to Rhode Island for a personal meeting with President Eisenhower at the summer White House in Newport. He did not get what he wanted. Eisenhower reiterated what he told Faubus by telegram several days earlier, namely, that "[t]he only assurance I can give you is that the federal constitution will be upheld by me by every legal means at my command."<sup>37</sup>

On September 20th, the federal court enjoined Faubus and the Arkansas National Guard from obstructing black students from attending the high school. The order explicitly stated that the governor retained his authority to use the National Guard to maintain peace and order. Peace and order were not what Faubus had in mind, however, and he withdrew the Guard entirely.

When the Little Rock police arrived at Central High School at 6:00 A.M. on September 23rd to secure the area for the enrollment of black students that morning, they found themselves confronting an ugly mob. The police cleared vital areas with swinging nightsticks and erected sawhorse barricades. At 8:45 A.M. someone in the crowd screamed, "Here come the niggers,"<sup>38</sup> and the crowd overran the police to chase and beat four blacks who, as it happened, were not students but reporters.

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35. Manchester, *The Glory and the Dream* at 801 (cited in note 31).

36. Perret, *Eisenhower* at 508 (cited in note 31).

37. Manchester, *The Glory and the Dream* at 981 (cited in note 31).

38. *Id.* at 803.

During this spectacle, the nine black students slipped unnoticed into the school. Once inside, they had a relatively easy time of it. No white students displayed hostility; some made friendly advances. Meanwhile, matters outside continued to deteriorate. Attracted by news broadcasts, the mob swelled to nearly a thousand. In late morning, the crowd surged forward, overrunning the police and demolishing their barricades. As the mob reached the doors of the school, a now very worried Mayor Mann removed the black students from the school. The next morning he sent President Eisenhower a telegram in Newport. It began: "Immediate need for federal troops is urgent,"<sup>39</sup> The mob was even larger than yesterday, armed, and violent. "Situation is out of control and police cannot disperse the mob," it continued. "I am pleading to you as President of the United States . . . to provide the necessary federal troops" to restore peace and order.

Eisenhower was already aware of the situation. The day before his staff had prepared a presidential proclamation titled "Obstruction of Justice in the State of Arkansas" and providing for the use of federal troops, but the President had not yet signed it. He did so now. That night he went on national television to explain his action to the American people. "The very basis of our individual rights and freedoms rests upon the certainty that the President and the executive branch of government will support and insure the carrying out of the decisions of the federal courts, even, when necessary, with all the means at the President's command," he said.<sup>40</sup>

The next day President Eisenhower signed a second proclamation authorizing the Secretary of Defense to call the entire 10,000-member Arkansas National Guard into active federal service. Eisenhower was careful not to transmit this order through the normal channel, that is, the Governor of the state. The President placed Major General Edwin A. Walker in command and ordered him to ensure that the order was communicated directly to the Guardsmen.

Eisenhower did not nationalize the Arkansas National Guard in order to use them, at least not as his principal means of restoring order. The main objective was to deprive Faubus of the Guard. The main federal force was a thousand paratroopers

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39. Parret, *Eisenhower* at 552 (cited in note 31). For stylistic purposes, I have rendered the telegram in capital and small letters, although, as telegrams are, the original was entirely capitalized.

40. Manchester, *The Glory and the Dream* at 805 (cited in note 31).

from the elite 101st Airborne Division, who were flown in transport planes from Fort Campbell, Kentucky to Arkansas. Nevertheless, as John C. Mahon writes, federalizing the Arkansas National Guard "created a situation without precedent: it directed the Guardsmen to disregard their state commander-in-chief and obey the commands of the president at a time when they were on active state duty."<sup>41</sup>

Southern politicians fiercely denounced Eisenhower's actions. Senator Richard Russell of Georgia said Eisenhower was employing the tactics of Hitler's storm troopers. Senator Olin Johnson of South Carolina urged Faubus to challenge Eisenhower's authority over the Guard. "If I were Governor Faubus, I'd proclaim an insurrection down there, and I'd call out the National Guard, and I'd then find out who's going to run things in my state," he said.<sup>42</sup> Faubus did not do so, however. He referred to the military units as "occupation forces,"<sup>43</sup> and claimed they were guilty of all manner of outrages, including bludgeoning innocent bystanders and poking bayonets into the backs of schoolgirls with "the warm, red blood of patriotic Americans staining the cold, naked, unsheathed knives."<sup>44</sup> The accusations were, of course, hokum. There were confrontations between troops and the mob, during which one man who tried to seize a paratrooper's rifle was hit with a steel butt of an M-1. The students were enrolled and protected.

After the initial period, General Walker discharged all of the Arkansas National Guard (who, for the most part, had been required to spend the days in their armories), except for a special task force of 1,800 Guardsmen. In November, finances required returning the 101st Airborne detachment to Fort Campbell, and the Guardsmen became the main presence on the scene. The black students continued to be protected by a small contingent of Guardsmen for the balance of the school year.

### C. FEDERALIZING THE ALABAMA NATIONAL GUARD (1963).

A similar episode occurred on June 11, 1963, when Governor George C. Wallace of Alabama made his famous stand in the schoolhouse door to prevent two black students, Vivian

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41. Mahon, *History of the Militia and National Guard* at 225 (cited in note 6).

42. Manchester, *The Glory and the Dream* at 808 (cited in note 31).

43. Branch, *Parting the Waters* at 224 (cited in note 31).

44. Manchester, *The Glory and the Dream* at 807 (cited in note 31).



Malone and James Hood, from enrolling at the University of Alabama.<sup>45</sup>

The Kennedy Administration had been embarrassed when it relied on Governor Ross Barnett and state officials to protect James Meredith, who had registered as the first black student at the University of Mississippi in the fall of the preceding year. Federal marshals on the scene had been attacked by an armed mob. In the five hours before being rescued by federal troops, the marshals sustained more than two dozen gunshot wounds and many cuts and contusions. A bystander and a newsman were killed. It is understandable, therefore, that the Administration was jittery despite Governor Wallace's statement nine days earlier on *Meet the Press* that, although "I shall stand at the door as I stated in my campaign for Governor," the "confrontation will be handled peacefully and without violence."<sup>46</sup>

Even though Robert Kennedy made a special trip to Birmingham to ask him, Wallace would not tell Kennedy Administration officials exactly what he was planning. One source told them that the "thing is greased" and that Wallace would "make a gesture then step aside."<sup>47</sup> Another source reported Wallace intended to stand in the door with members of the Alabama Highway Patrol, who would be instructed to bar Malone and Hood even if escorted by federal marshals. The Administration decided to have troops ready if needed, and put General Creighton Abrams in charge of military planning.

Deputy Attorney General Nicolas Katzenbach, who had principal responsibility for the operation as a whole, told Abrams he had no opinion about whether to use regular Army or National Guard but that "it would probably be necessary to federalize the Guard to take it away from Wallace's control."<sup>48</sup> Ultimately, Attorney General Robert Kennedy decided to use the National Guard rather than regular army to avoid complaints about Yankee occupying forces.

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45. For the description of the Tuscaloosa episode, I draw heavily on Dan T. Carter, *The Politics of Rage: George Wallace, The Origins of the New Conservatism, and the Transformation of American Politics* 133-55 (Simon & Schuster, 1995), and Stephan Leshner, *George Wallace: American Populist* 201-36 (Addison-Wesley Pub. Co., 1994). I also consulted E. Culpepper Clark, *The Schoolhouse Door: Segregation's Last Stand at the University of Alabama* (Oxford U. Press, 1993); Greenberg, *Crusaders in the Courts* at 334-40 (cited in note 31); Mahon, *History of the Militia and National Guard* at 237-38 (cited in note 6); Manchester, *The Glory and the Dream* at 979-81 (cited in note 31).

46. Carter, *The Politics of Rage* at 137 (cited in note 45).

47. Clark, *The Schoolhouse Door* at 208 (cited in note 45).

48. *Id.*

On the day of the confrontation, Wallace assembled a force of seven hundred state troopers and National Guardsmen. As it turned out, they were there for cosmetics. George Wallace was a lot more savvy than Orval Faubus. Wallace knew exactly what he wanted. It was not violence. It was good television.

The Kennedy Administration's strategy was to render the doorway stand meaningless. The University had preregistered the two students and assigned them to dormitories, so there was no practical need for them to enter Foster Auditorium. Nevertheless, the Administration decided to allow Wallace to have his show. Wallace painted a white line on the ground outside Foster Auditorium, where students entered to register, and ensconced himself in an office just inside the entrance.

Deputy Attorney General Nicolas Katzenbach told the press that the students would arrive at 10:00 A.M. When a look-out signaled that Katzenbach and the students had arrived, Wallace appeared on the front steps with a contingent of armed state policemen in combat gear. A Wallace aide placed a classroom lectern and microphone in front of the double doors at the main entrance to Foster Auditorium, and Wallace took up position behind the lectern. While Malone and Hood remained in the cars, Katzenbach, flanked by the United States Attorney and U.S. marshals, strode up to the lectern. Wallace raised his right hand, as would a traffic cop ordering cars to stop. "I have a proclamation from the President of the United States ordering you to cease and desist from unlawful obstructions," stated Katzenbach.<sup>49</sup> "I have come to ask you for unequivocal assurance that you or anyone under your control will not bar these students."<sup>50</sup>

Wallace did not respond. After an awkward silence, Katzenbach tried to resume his statement, only to have Wallace cut him off. "Now you make your statement, but we don't need a speech."<sup>51</sup> After a few more sentences from Katzenbach, Wallace launched into a seven-minute speech denouncing the "unwarranted and force-induced intrusion upon the campus of the University of Alabama of the might of the central government," with the climactic conclusion forbidding "this illegal and unwarranted action by the Central Government."<sup>52</sup>

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49. Manchester, *The Glory and the Dream* at 980 (cited in note 31).

50. Carter, *The Politics of Rage* at 148 (cited in note 45).

51. *Id.* at 149.

52. *Id.*

"I'm not interested in this show," Katzenbach replied, trying to comply with the Attorney General's instructions to make Wallace look foolish. "These students will remain on this campus," he continued. "They will register today. They will go to school tomorrow."<sup>53</sup> The two men stood silently looking at one another for a few moments; Katzenbach then turned and departed. This, as it turns out, was the scene that Wallace wanted. The visual television image was of the Governor of Alabama standing nose to nose with an representative of the federal government, with the Governor standing his ground and the federal official retreating. Not everyone saw it this way, of course, but many of Wallace's constituents did. Federal officials took Malone and Hood to their dormitories. Later in the day, when Malone sat alone in the University cafeteria about a half dozen women students brought their food trays to her table, and smiling, sat down and introduced themselves.

When Katzenbach returned to his office, he recommended nationalizing the Alabama National Guard, and the President signed an executive order doing so shortly thereafter. The Guard was placed under the immediate command of National Guard General Henry V. Graham, who was in the real estate business in Birmingham. Early in the afternoon, Graham met with a Wallace aide, who assured him that if Wallace were allowed to read a second statement he would step aside without trouble. Graham passed this offer to General Creighton Abrams, who in turn passed it on to the Attorney General, who approved the deal.

Just before 3:00 P.M. Graham arrived at the University with a hundred now-federalized Guardsmen. Flanked by four armed soldiers—and dressed in combat fatigues with the Confederate battle flag of the 31st (Dixie) Division sewn over his pocket—Graham strode up to Wallace's lectern, behind which the governor had repositioned himself. Graham saluted Wallace and said, "Sir, it is my sad duty to ask you to step aside under orders from the president of the United States."<sup>54</sup> Wallace returned the salute and said he wanted to make a statement. "Certainly, sir," responded Graham, who then stepped aside. "But for the unwarranted federalization of the National Guard, I would be your commander-in-chief," said Wallace. "It is a bitter pill to swal-

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53. Id.

54. See Leshner, *George Wallace: American Populist* at 233 (cited in note 45).

low.”<sup>55</sup> After a few additional remarks, Wallace honored his word and walked away.

That night, President John F. Kennedy addressed the nation on television. “Good evening, my fellow citizens,” he began. “This afternoon, following a series of threats and defiant statements, the presence of Alabama National Guardsmen was required on the University of Alabama [campus] to carry out the final and unequivocal order of the United States District Court.”<sup>56</sup>

#### D. THE MONTGOMERY AMENDMENT (1987)

In 1985, the federal government ordered more than 12,000 National Guardsmen for active duty training in Central America, principally Honduras. President Reagan wanted to use these exercises to intimidate the Sandinista government in Nicaragua with a show of force and to assist in developing a staging area for a Contra-rebel invasion of Nicaragua.<sup>57</sup> At that time, federal statutes permitted the Secretary of Defense to order members of the National Guard to active duty outside the United States only with the consent of the state’s governor. A survey by the Congressional Research Service revealed that less than half the governors would approve training exercises in Honduras. When the Reagan Administration proceeded with the program nonetheless, the governors of more than a dozen states (and the Iowa legislature) balked, and the governors of California and Maine successfully refused directives to send units there.<sup>58</sup>

In response to what it viewed as a problem of allowing governors to veto National Guard training exercises outside the United States, Congress enacted legislation known as the Montgomery Amendment. That statute authorizes the Secretary of Defense to order National Guard members to active federal duty for training for up to fifteen days a year notwithstanding a gubernatorial objection on the grounds of “location, purpose, type, or schedule” of the duty.<sup>59</sup> The Governor of Minnesota challenged the constitutionality of this legislation.<sup>60</sup> He argued

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55. See Carter, *The Politics of Rage* at 150 (cited in note 45).

56. *Id.* at 152.

57. See *Defending the Nation* at 24 (cited in note 24).

58. *Id.*

59. 10 U.S.C. § 12301(f) (1994). Members of the reserve components, including the National Guard, may be ordered to active duty without gubernatorial consent in times of war or national emergency declared by Congress or a national emergency declared by the President. 10 U.S.C. §§ 12301(a) (1994), 12302(a) (1994).

60. *Perpich*, 496 U.S. at 337.

that the Constitution only authorizes the federal government to call forth the militia for three specific purposes, namely, to execute the laws of the United States, suppress insurrections, and repel invasions. Thus, he maintained, the federal government could not nationalize the state militia for any other purpose, including training, without gubernatorial consent.

The Supreme Court declared the Act to be constitutional.<sup>61</sup> The Court's decision was grounded in the dual enlistment program established by Congress. Under this program, all members of the National Guard simultaneously enroll in both their state's National Guard and the National Guard of the United States (NGUS). Under the structure established by Congress, NGUS is part of the reserve component of the United States Armed Forces.<sup>62</sup> Federal law expressly provides that when members of the National Guard are ordered to active duty, they serve in their capacity as reserves of the United States Army or Air Force, as the case may be.<sup>63</sup> The Supreme Court held, therefore, that because all of the members of the Minnesota National Guard had voluntarily enrolled in NGUS, they could be ordered to Honduras in that capacity. During periods of active duty service, NGUS members would be "temporarily disassociated" from the state militia.<sup>64</sup>

The Supreme Court found this plan constitutionally sound because, it said, the militia clauses of the Constitution gave Congress additional military powers without in any fashion limiting its authority to maintain an Army and a Navy. Congress can draft citizens into the armed forces without regard to whether they serve in a state militia. Thus, Congress can require dual enrollment and order militia members into active duty in their capacities as members of the federal armed forces notwithstanding their militia membership.

The Governor of Minnesota argued that this interpretation of the militia clauses nullified the state's authority over its militia. The Court rejected this argument, stating that its interpretation "merely recognizes the supremacy of federal power in the area of military affairs."<sup>65</sup> Most significantly for our purposes, the Court noted that because the Montgomery Amendment only prohibited the governors from objecting to active duty assign-

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61. *Id.*

62. 10 U.S.C. § 10101.

63. 10 U.S.C. § 12403.

64. *Perpich*, 496 U.S. at 347.

65. *Id.* at 351.

ments on the grounds of "location, purpose, type, or schedule," the Governor of Missouri could object to sending his state's National Guard to Honduras if that interfered with the state's ability to respond to local emergencies.

#### IV. ANALYZING THE CASE HISTORIES

Did the federal government violate the Second Amendment in any of these four incidents? An examination of that question begins with the observation that the Constitution appears to guarantee states the right to a militia. While it does not do so expressly, four constitutional provisions<sup>66</sup> refer to the militia and thus presuppose their existence, and one of the provisions gives the states certain powers over the militia, including the right to appoint officers of the militia.<sup>67</sup> These four sections are properly read together. One of the things that the Second Amendment adds is that the states not only have a right to militias but to armed militias.

From its text and history, I believe we know the Second Amendment guarantees the states the right to armed militias so that they can provide for their own security. When the Second Amendment was written, the South was not confident that Congress would react forcefully to quell slave insurrections in southern states. Indeed, the South was afraid Congress might actively encourage slave revolts by disarming or otherwise compromising the state militia. By writing the Second Amendment, Madison sought to prohibit Congress from disarming the state militia. If Congress tried to disarm the militia indirectly by simply not furnishing arms to the militia, the Second Amendment essentially permits the state governments, or the people themselves, to supply the arms.<sup>68</sup>

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66. I refer to the provisions: (1) giving Congress the authority to call forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions (Art. I, § 8, cl. 15); (2) giving Congress the power to organize, arm, and discipline the militia, and govern them while in service of the United States, and—most significantly for these purposes—expressly reserving to the states the power to appoint officers and train the militia in accordance with the discipline established by Congress (Art. I, § 8, cl. 16); (3) making the President the Commander in Chief "of the militia of the several states" when called into federal service (Art. II, § 2, cl. 1); and (4) the Second Amendment.

67. Professor Tribe has noted that the Constitution presupposes "the existence of the states as entities independent of the national government" because it refers to the states and "expressly place[s] limits on the power of Congress in the interest of state sovereignty." Tribe specifically mentions the militia clauses in this connection. Laurence H. Tribe, 1 *American Constitutional Law* § 5-12 at 907 (Foundation Press, 3rd ed. 2000). Similarly, the militia clauses presuppose state militias, or at least a state right to a militia.

68. Don Higginbotham, an authority on the eighteenth century militia, agrees. He

I do not argue, however, that this right is absolute. No right is absolute, whether belonging to an individual or a state. Moreover, the Constitution provides a sophisticated structure in which the rights and obligations concerning the militia are divided between the federal and state governments. As previously suggested, a state may have no right whatsoever to a militia if Congress calls the entire militia into federal service to repel an invasion, at least until danger has passed. It is less clear, however, whether the federal government can deprive a state of its militia in less dire circumstances, or if so, under what circumstances or for how long.

Of the four incidents in Part III, the federal action that most directly infringed on the states' right to an armed militia was the first one, that is, depriving the southern states of their militia during Reconstruction. The very purpose of the federal action was to abridge the states' constitutionally guaranteed right to a militia, especially an armed militia. But that does not necessary mean the courts should have declared this to be unconstitutional.

Paradoxically, the federal government violated the letter of the Second Amendment in order to effectuate its spirit. Ten states had gone to war against the Union. That bloody war, with its terrible passions, had ended less than two years earlier. The terms of surrender at Appomattox Court House allowed Confederate officers to keep their guns.<sup>69</sup> Two days after Appomattox, President Lincoln gave a speech in which he told the nation that though the war's end was cause for joy, the task of reconstruction was "fraught with great difficulty."<sup>70</sup> "No one man has authority to give up the rebellion for any other man," he observed.<sup>71</sup> Three days later Lincoln was assassinated.

Andrew Johnson and Congress, to grossly understate it, did not see eye to eye about Reconstruction. Congress took the position that the southern states had forfeited their constitutional rights and that it was Congress's prerogative to decide when those rights would be restored.<sup>72</sup> Johnson's desire for a more le-

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writes that "the amendment seems to imply that the concurrent power of the state and federal governments over the militia will not threaten the states or obstruct their use of the militia when not in federal service. Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 Wm. & Mary Q. 39, 50 (1998).

69. See Paul Johnson, *A History of the American People* 494 (Harper Collins, 1998).

70. See Stephen B. Oates, *With Malice Toward None: The Life of Abraham Lincoln* 423 (Harper & Row, 1977) (quoting Lincoln's speech).

71. *Id.*

72. Johnson, *A History of the American People* at 500 (cited in note 69).

nient approach escalated into disputes that ultimately led to his impeachment. The legislation prohibiting militia in the former Confederate states was part of Congress's program of withholding the rights of the southern states until Congress believed it prudent to restore them. Johnson disagreed with both Congress's policy generally and with this measure specifically. A veto was unrealistic, however. The military ban was included in legislation providing for the payment of Union soldiers; and Johnson, an unelected president from the South, could not afford to be perceived as standing in the way of paying Union soldiers. Besides, Congress probably would have overridden the veto, as it did with Johnson's vetoes of other Reconstruction legislation that he considers too harsh.

Much has been written about whether Congress was motivated by hatred and a desire to punish rather than reconstruct the South, and about whether the Republican congressional majority was also influenced by a partisan desire to control the South politically. Yet these were unique and difficult times.<sup>73</sup> A civil war had just ended, and many within the southern states remained bitter and hostile to the national government, as well as to freedmen. In June 1866, a joint committee of Congress charged with investigating conditions in the post-war South reported that the South was "in anarchy" and under the control of "unrepentant . . . rebels."<sup>74</sup> No court could properly have substituted its own evaluation for Congress's judgment that that former Confederate army units were reorganizing as militia units, endangering the security of the reemerging states and their citizens. The question is whether, accepting the congressional findings on their face, suspending the states' right to militia was unconstitutional.

To answer that question, one must ask whether the government may properly exercise extraordinary powers during war or other periods of crises. At least twice, the Supreme Court has held that it may. During World War I, the Court upheld convic-

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73. As Henry P. Monaghan observed, "A bloody Civil War, an event wholly unforeseen by the founding generation, may not be a fruitful source for deriving constitutional lessons." Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 27 (1993). That is certainly the case here. I ask whether the militia prohibition violated the Second Amendment although Congress took the position that all states' rights were in a period of suspension. Indeed, Congress ultimately established military governments in what it called the "Rebel States." Nevertheless, to use this case history as a tool for drawing lessons of general applicability about the Second Amendment, I assume that constitutional normalcy was required to the greatest extent possible.

74. See Johnson, *A History of the American People* at 502 (cited in note 69).



tions for making speeches and circulating flyers questioning the government's war policies because they allegedly obstructed military recruiting efforts.<sup>75</sup> In the World War II Japanese internment cases,<sup>76</sup> the Supreme Court more directly held that during war the government's power expands as necessity requires. Writing for the Supreme Court in *Korematsu*, Hugo Black declared that the government's "power to protect must be commensurate with the threatened danger."<sup>77</sup> Concurring, Felix Frankfurter declared that "the validity of action under the war power must be judged wholly in the context of war," and that an action should not "be stigmatized as lawless because like action in times of peace would be lawless."<sup>78</sup> In *Hirabayashi*, the Supreme Court invoked Charles Evans Hughes' famous phrase that the "war power of the national government is 'the power to wage successfully.'"<sup>79</sup>

The principle that the government's powers expand during war or other grave emergencies is, however, extremely controversial. The confinement of Americans of Japanese descent during the Second World War has come to be considered a national disgrace. In 1988, Congress enacted legislation formally apologizing for the internment and providing restitution to the individuals of Japanese ancestry who were interned,<sup>80</sup> and the Supreme Court's decisions in the Japanese internment cases are generally considered among its worst.<sup>81</sup> The government did not

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75. *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919). The Supreme Court purported to apply the same test used in peacetime. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent," Justice Oliver Wendell Holmes, Jr. wrote for the Court. *Schenck* at 52. However, the Court accepted, without meaningful review, the government's allegation that the defendants' statements created insubordination in the armed forces or obstructed military recruiting or enlistment. "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court no regard them as protected by any constitutional right" Holmes added. *Id.*

76. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

77. *Korematsu*, 323 U.S. at 220.

78. *Id.* at 224.

79. *Hirabayashi*, 320 U.S. at 93.

80. Civil Liberties Act of 1988, 50 U.S.C. App. § 1989 et seq.

81. See, e.g., Bernard Schwartz, *A Book of Legal Lists: The Best and Worst in American Law with 100 Court and Judge Trivia Questions* 76-78 (Oxford U. Press, 1997) (placing *Korematsu* number six among the ten worst Supreme Court decisions of all time); J.M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, 1018 (1998) (listing *Korematsu*, together with *Lochner v. New York* and *Plessy v. Ferguson*, as a case "that any theory worth its salt must show [to be] wrongly

attempt to suppress civil liberties during the Vietnam War to the same degree as it had during earlier engagements,<sup>82</sup> and when the government asked the Supreme Court to enjoin the *New York Times* from publishing the Pentagon Papers, classified documents relating to origins of American involvement in Vietnam, the Court refused.

Perhaps the more liberal experience during the Vietnam War was the result of a durable change in attitudes about suppressing civil liberties during wartime, influenced in part by shame over the Japanese internment. It is at least as likely, however, that the nation could simply afford a more liberal attitude because the Vietnam War never threatened American nationhood. When the nation's existence is in peril, the people will expect their leaders to take extraordinary, and if necessary extra-legal, measures. Even those who reject the principle that the government's powers should be deemed to expand during war acknowledge these realities. Laurence H. Tribe, for example, writes that "[i]n retrospect, the Supreme Court's tolerance of wartime excesses of Congress and the Executive seems wrong, but in retrospect it is also clear that the Court saw no reasonable alternative to deference."<sup>83</sup> The Court may believe deference is required for the national safety, or it may believe that if the Court intervenes it will be perceived as aiding and abetting an enemy and destroy its own credibility in the eyes of the public.<sup>84</sup> Yet there is grave danger in legitimizing the principle that power expands during national emergencies. If the courts were to sanction such a principle, they would give putative autocrats a tool for unraveling the Constitution and seizing power. Crises can be unscrupulously feigned, manufactured, or sustained. McCarthy-esque figures can create paranoia without even the threat of open warfare.

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decided"); William N. Eskridge, Jr. and Philip P. Frickey, *Forward: Law as Equilibrium*, 108 Harv. L. Rev. 26, 94 (1994) (listing *Korematsu*, along with *Plessy*, as a quintessential example of a case in which the Supreme Court yielded to popular prejudice only to look foolish or short-sighted). Probably the most noteworthy dissenting view is that of Chief Justice William H. Rehnquist, who defends the Court's decisions in the internment cases. William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (Knopf, 1998).

82. See Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. Cal. L. Rev. 1389, 1392-95 (1993).

83. Tribe, *American Constitutional Law* § 5-18 at 966 (cited in note 67).

84. Another view, which is falling into increasing disfavor, is that courts should always defer to the political branches in all questions involving foreign affairs, generally by invoking the political question doctrine. See, e.g., Thomas M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton U. Press, 1992).

Surprisingly little has been written about whether the power of the national government as a whole—that is, Congress and the president acting together—expands during wartime or periods of dire emergency. Because the greatest fear is that of an overreaching president, judicial opinions and scholarship have most frequently focused on presidential power, and specifically on whether the President can take military action without congressional approval.<sup>85</sup> Indeed, the phrase *war power* generally refers to the scope of the president's power as commander in chief of the army and navy—and, as useful to mention for our purposes, “of the Militia of the several States, when called into the actual Service of the United States”<sup>86</sup>—to send American forces into combat without a congressional declaration of war.

Often the problem is whether the president may act with tacit congressional approval, that is, with Congress not expressly authorizing the military action but not taking action to terminate it by, for example, cutting off funds. Nearly the reverse situation occurred when Congress enacted legislation depriving the southern states of their militia during Reconstruction. President Johnson signed the legislation despite his misgivings about its constitutionality because the legislation also provided for paying Union soldiers. (Johnson may have expected that Congress would override his veto, thus earning him the enmity of Union soldiers for no ultimate purpose.) Notwithstanding Johnson's reluctance, Congress and the President did act together. The question before us, therefore, is not whether one of the political branches of the government infringed upon powers belonging to the other but rather whether the federal government—at the maximum extent of its power, based on the combined action of Congress and the president and a situation of warlike exigency—was justified in temporarily abrogating the states' right to have militia.

One might argue that the federal action was justified regardless of whether the government's powers were enlarged by crisis. The argument runs as follows. The Second Amendment's spirit should trump its letter. The Amendment's purpose is to allow the states to provide for their own security, and the Amendment therefore should be read as guaranteeing a state a

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85. See, e.g., Carl T. Bogus, *The Invasion of Panama and the Rule of Law*, 26 Int'l Law. 781 (1992); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 Yale L.J. 1385 (1989); Charles Bennett, et al., *The President's Powers as Commander-in-Chief Versus Congress' War Power and Appropriations Power*, 43 U. Miami L. Rev. 17 (1988).

86. U.S. Const., Art. II, § 2, cl. 1.

right to a militia only when a militia is, in fact, necessary for the security of the state and its citizens. The preamble of the Amendment lends special force to this argument. Because the drafters expressly told us why they granted the right, we need not worry about our failing to recognize the founders' objectives and can feel confident about knowing when the right no longer serves its intended purpose.<sup>87</sup> Thus, when for any reason the militia is not necessary for the security of a free state, the right should be considered inactive or, as some commentators have put it, "in suspension."<sup>88</sup> The nation need not be at war or in crisis. If changed circumstances have eliminated the necessity of the militia, the right may be considered suspended even during periods of normalcy.

This argument is problematic however. While it is perfectly sensible as a matter of constitutional theory to hold that time can turn constitutional provisions into anachronisms, it is ticklish as a practical matter to declare a right out of date. It would be one thing if everyone agreed that a provision had outlived its usefulness (though almost by definition that is unlikely to arise in contested cases). It is quite another thing for a court to abrogate a right because it finds we are now better off without it. Such a court would be criticized for taking it upon itself to amend the Constitution.<sup>89</sup>

A more moderate approach would hold that the Second Amendment right may be suspended when state control of a militia jeopardizes the security of the state or its citizens. Thus, the right remains active as long as it serves the interests of security or is simply benign. But the right may be suspended when it is actively counterproductive. There should be a presumption that the right remains active during periods of normalcy. The case for suspending the right is strongest during relatively brief periods of crisis. And the case is strongest as well when Congress, which has the constitutional authority to organize the militia,

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87. Justice Scalia has cautioned about the hazards of abstracting a right from its purposes and then eliminating that right because it finds the purposes are served in other ways. See *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting). That concern is ameliorated when the Constitution expressly states that a right has been included to serve a particular objective.

88. Uviller and Merkel, 76 Chi. Kent L. Rev. at 560 (cited in note 3).

89. There may be a fine line between this and effectively amending the Constitution by reinterpreting a provision in light of changed times and circumstances. Nevertheless, there is a difference between a court modifying its interpretations of a provision and snipping out the provision.

and the President, who is commander in chief of the militia when it is into national service, act together.<sup>90</sup>

Congress prohibited militias in the ten former Confederate States because it found them to endanger public security. It conducted an investigation. It found the southern states to be in anarchy, and it found that the southern militias were being reconstituted from former Confederate Army units. Although in normal circumstances the militia serves as a counterweight to anarchy, Congress found that under these unusual and perilous circumstances, the militias would endanger the stability of state government (whether civilian or military) during the period of Reconstruction.

Moreover, it does not appear that Congress had an alternative that would have allowed the southern states to have militias without creating grave risks. Because states select the officers of their militia, Congress may not have been able to ensure that militias were loyal to the United States. Restricting militia eligibility to those who had not served in the Confederate Army may not have been a practical option, as presumably nearly every white fit for military service served in that army.<sup>91</sup> Restricting the militia to freed blacks would have been even more repugnant to the founders' original intent than prohibiting the militia entirely. The specific concern that led to Madison's writing the Second Amendment was the fear that Congress would disarm the southern militias and thus leave the white population vulnerable to slave revolt. Although black citizens no longer needed to revolt to secure their freedom, the white population, fearing retribution, would have been terrified of a black militia.<sup>92</sup> I con-

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90. I leave aside the question of how much deference the Supreme Court ought to give the political branches. Briefly, I believe the Supreme Court must take into account political and practical exigencies, including the need of the political branches to act rapidly and decisively in emergencies. But I concur generally with view that the Court must not abdicate its responsibilities to uphold the Constitution, and that, as Thomas M. Franck has put it, "in our system a law that is not enforceable by adjudicatory process is no law at all." Franck, *Political Questions/Judicial Answers* at 8 (cited in note 84).

91. Nearly one million men—90 percent of the able-bodied, adult, white population—served in the Confederate Army. See Johnson, *A History of the American People* at 462, 466 (cited in note 69).

92. I am not suggesting that Madison and the founders' concern about slave control should forever shape how we interpret the Second Amendment. They wrote the Amendment in general terms, and the Amendment therefore did not expire with the end of slavery. It will continue to have viability as long as there are threats to the security of states and their citizens from any source. Nor I am suggesting that a black militia was a greater threat to white citizens than a white militia was to black citizens. However, the formation of black militias probably would have caused the formation of white paramilitary organizations (which, of course, eventually occurred with the Ku Klux Klan and similar groups), frustrating reconstruction efforts.

clude, therefore, that Congress did not violate the Second Amendment by prohibiting militias in the ten Confederate States during the early Reconstruction period.

Much of what has been said about the propriety of suspending a state's right to an armed militia during crisis applies to the Little Rock and Tuscaloosa episodes as well. In each instance, the President called up the state militia pursuant to a specific constitutional warrant, that is, to execute the laws of the United States, as decreed by federal courts. In each instance, there was a crisis requiring federal military intervention. Although the events did not rise to the level of wartime-like emergencies, they were serious and presented challenges to the rule of law. President Eisenhower federalized the Arkansas militia—the entire state militia—not because he intended to use it as his instrument for directly executing the laws (he relied on 101<sup>st</sup> Airborne units and U.S. marshals for that) but to deprive the state's governor of its use. That was legitimate; once the president decided to dispatch federal personnel, it was only proper that he try to reduce the risks of hostile actions that might threaten federal personnel or interfere with their mission. By calling the Arkansas National Guard into federal service, President Eisenhower was seeking to preserve peace and security in Arkansas, not threatening it.

Wallace's stand in the schoolhouse door presents other interesting features. As it turned out, the federalization of the Alabama National Guard had little military significance but potent political significance. For one thing, the doorway stand was purely symbolic. And the federal government probably would have had little difficulty protecting Malone and Hood without calling up the Guard. Yet somehow federalization of the Guard ended the crisis (or perhaps, in this case, faux crisis). The denouement of the episode was General Graham's saluting the Governor and informing him that he and the state Guard were now in the service of the President of the United States. Surely this was not because this dissolved the possibility of U.S. Armed Forces and Alabama National Guard going to war with each other. That was not remotely within the realm of possibility. Was it because nationalizing the Guard somehow tangibly demonstrated the supremacy of federal authority? Was it because depriving the Governor of his use of the Guard somehow politically emasculated him? The national government's ability to federalize—or the state's ability to retain—the militia are political as well as military assets. In considering whether the national government can properly deprive a state of its militia in some fu-

ture scenario, it may be relevant to consider the psychological and political ramifications as well as purely military issues.

What if in a time of crisis a benevolent governor needed her state's militia to preserve peace and order and a malevolent president, desiring uncontrolled rioting, federalized the militia and confined them to their armories?<sup>93</sup> In that case, we might regret precedents approving the federalization of state militias to deprive governors of their use. The courts provide the only institutional check on this kind of misuse of power, although a far from perfect check it must necessarily be. Courts must generally defer to the judgment of the political branches in time of crisis; often the best they can do is to condemn actions after the fact.<sup>94</sup> Issues involving the Second Amendment and the militia are not unique in this respect. During an emergency, however, the president must have the ability to call the militia into federal service, against the governor's wishes if need be. Since the Civil War, it is clearly unacceptable for state forces to clash militarily with federal forces. We should not, therefore, read the Second Amendment as an impediment avoiding such conflicts by the president's exercise of his constitutional authority as commander-in-chief.

The battle between the governors and the Reagan Administration over sending National Guard units to Central America, and the subsequent enactment of the Montgomery Amendment, raise other issues. As a practical matter, the federal government can deprive a state of its armed militia by sending it away. The anti-Federalists raised this specific concern when they argued that the Constitution gave the federal government too much power over the state militia.<sup>95</sup> Federal statutes now give the President and the Secretary of State considerable powers to call the militia into federal service. The Secretary may call up the militia during a war or national emergency declared by Congress, and the militia forces may remain in federal service for the duration of the war or emergency plus six months.<sup>96</sup> The Secretary may call up the militia during a national emergency declared

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93. As Garry Wills observes, however, history has shown that abuse of individual rights and peccancy tend to thrive more at the local level, and the federal government has often been the rescuer of the weak abused by the powerful. See Garry Wills, *A Necessary Evil: A History of Distrust of Government* 110 (Simon & Schuster, 1999).

94. By invoking the political question doctrine, as first articulated in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), courts may escape condemning improper action after the fact as well.

95. See Bogus, 31 U.C. Davis L. Rev. at 344-54 (cited in note 12).

96. 10 U.S.C. § 12301(a) (1994).

by the President, but in this case the militia forces may be retained in federal service for no more than twenty-four consecutive months.<sup>97</sup> Finally, and most broadly, the Secretary of Defense may call up the militia whenever "the President determines that it is necessary to augment the active forces for any operational mission[.]"<sup>98</sup>

The militia may be called into federal service "to execute the Laws of the Union, suppress Insurrections and repel Invasions."<sup>99</sup> Once called into federal service for such a purpose, the President, as commander-in-chief, can send militia forces where she sees fit. If, for example, hostile forces were to invade Seattle, the President could send the entire Massachusetts National Guard to Washington State to repel the invasion, even if this were to reduce internal security within Massachusetts. The security of the nation transcends that of individual states. And although the language of the Constitution seems to contemplate the militia being used only domestically to "suppress Insurrections and repel Invasions," a reasonable interpretation of the President's war power would allow him to send militia forces into British Columbia if that were required for effective military operations. Nor, at least under Supreme Court precedents, would it be problematic for the President to send part of the Massachusetts National Guard to some distant locale for training purposes.<sup>100</sup>

However, if the Second Amendment is properly read as guaranteeing states some minimum right to an armed militia, the President, even with Congress's consent, would not be authorized in sending the entire Massachusetts Guard to some distant locale for training or some other non-emergency purpose, especially if this left Massachusetts vulnerable to an internal threat. This does not mean that Congress cannot organize the militia as it has, in making every member of the Massachusetts National Guard is also a member of the reserve forces of the United States. But Congress should not be able to use this method of organization to deprive a state of its right to an armed militia. That is, each member of the Massachusetts National Guard may be ordered—in his or her capacity as a member of the reserve

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97. Id. § 12302(a) (1994).

98. Id. § 12304(a) (1994).

99. U.S. Const., Art. I, § 8, cl. 15.

100. A student commentator has persuasively argued that the Constitution exclusively reserves to the states the authority to train the militia. See Monte M.F. Cooper, *Perpich v. Department of Defense: Federalism Values and the Militia Clause*, 62 U. Colo. L. Rev. 637 (1991).



forces of the United States—to training exercises in Washington State; the problem arises when every member of the Massachusetts Guard is so dispatched. That is not what occurred in the events giving rise to *Perpich* however. In this scenario, too, therefore, the states' Second Amendment rights were not violated.

I have argued that, except in extreme circumstances, the Second Amendment provides the states with some minimum right to an armed militia. What are the parameters of that right? How large a militia—in absolute numbers or in proportion to population—is a state entitled to? What types and numbers of arms does a state militia have a right to possess? Those questions cannot be answered in the abstract. The Second Amendment sets forth a principle, not a formula. The parameters of the right can only sensibly be mapped on a case by case basis.

Perhaps the need to do so will never arise. At this writing, no such clash between federal and state governments appears on the horizon. But we do not have a crystal ball. When the Constitution was written, the southern states genuinely feared the prospect of the federal government deliberately attempting to deny them armed militias.<sup>101</sup> It is perhaps no coincidence that concerns about the federal government undermining the slave system led to the Second Amendment, and that the first three of these case histories are part of slavery's legacy. Issues creating distrust and dissension between the federal and state governments may be very different in the future. No one can foresee what those issues may be. Under a collective rights interpretation, however, the Second Amendment remains a vital constitutional provision. It is a discrete but important element of federalism, guaranteeing the states not only a right but the capacity to provide for their own security.

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101. It bears mentioning that when the Second Amendment was enacted, the militia constituted the state's exclusive instrument of armed force. Police forces did not exist until the early nineteenth century. See Carl T. Bogus, *Race, Riots and Guns*, 66 S. Cal. L. Rev. 1365, 1378-80 (1993). Today, of course, police help protect a state from riots or other internal disruptions. Thus, when considering whether a state's security may be jeopardized by depriving it of its militia, it is appropriate to consider that the availability of police.